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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 865

ATHANASIOS PATSIS a/k/a/ THOMAS NICKAS,
Petitioner

vs.

IMMIGRATION & NATURALIZATION SERVICE.

PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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ARGUMENT

Petitioner contends that this petition for rehearing should be granted on his petition for writ of certiorari so that the irreconcilable conflict as to the proper interpretation to be given Section 244(a)(5), 8 U.S.C. §1254(a)(5) can be resolved by the decision of this Court.

It is apparent that the decisions of the Eighth Circuit in *Patsis* v. *Immigration and Naturalization Service*, 337

F.2d 733 (8th Cir. 1964) and the Ninth Circuit in *Fong* v. *Immigration and Naturalization Service*, 308 F.2d 191 (9th Cir. 1962), are in conflict. Their approach as to the proper interpretation of Section 244(a)(5) is distinctly different. In *Patsis* the Eighth Circuit held that a violation of Section 265, 8 U.S.C. §1305, would destroy an otherwise acceptable ten-year period of good character as required by Section 244(a)(5). On page 195 of its opinion in *Fong* the Ninth Circuit held a violation of Section 265 to be "only a minor infraction".

On pages 26 and 27 of its brief in the Eighth Circuit, in *Patsis*, the Immigration and Naturalization Service could not find *Fong* to be distinguishable, but instead it argued that the decision should be rejected. In other words, in its brief urging the result ultimately reached by the Eighth Circuit in *Patsis*, the Service, itself, at the outset, realized that *Fong* would be in conflict. In part, the Service argued on pages 26 and 27:

> ". . . there is, however, support for the position that the 10-year residence requirement in Section 244(a)(5) could be computed from the date an alien first committed an act or assumed a status for which he was deportable even though it was not within the paragraphs of Section 241(a) enumerated in Section 244(a)(5). *Louie King Fong* v. *Immigration and Naturalization Service*, 308 F.2d 191 (C.A. 9). There, the alien was ordered deported solely for failure to furnish annual address reports as required by Section 265 of the Act, 8 U.S.C. 1305. However, the alien could have been found deportable under Section 241(a)(2) for illegally remaining in the United States in 1944 or for accepting unauthorized employment in that year. The Ninth Circuit held that the 10-year period could be computed from the date of the commission in 1944 of the first deportable act. We see no basis for distinguishing this case from *Fong* merely because this case involves Section 241(a)(1) and *Fong* involved Sec-

tion 241(a)(2). Accordingly, under the *Fong* doctrine, petitioner would have met the 10-year residence requirement of Section 244(a)(5) as it read before it was amended in 1963.

"However, the *Fong* approach should be rejected."

Petitioner submits that if this petition for rehearing is denied, Congress will be held to have intended to have enacted meaningless legislation. It is apparent that an alien under the *Patsis* doctrine can never meet the 10-year good character requirement of Section 244(a)(5) due to the requirement of Section 265. As soon as he complies with Section 265 (during that 10-year period) his 10-year good character period would, for practical purposes, be ended. He would be deported.

The *Fong* approach, however, would compute the 10-year period of Section 244(a)(5) from the date of an assumption of any deportable status. By way of dictum the Court in *Tibke* v. *Immigration and Naturalization Service*, 335 F.2d 42, 47 (2nd Cir. 1964), would seem to adopt the *Fong* treatment of Section 244(a)(5).

It is also urged that the question involved here, and the attendant conflict of decisions on that question, is not made moot by the enactment of Section 4 of the Act of October 24, 1962, 76 Stat. 1247. It is arguable that Section 4, which made the provisions of Section 244(a)(5) inapplicable to a crewman, should not be made to operate retroactively. This Court in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217 (1963) held that it was at least still arguable whether the amendment of Section 244(a)(5) made moot the jurisdictional issue involved there. On page 221, footnote 4, this Court stated:

"On October 24, 1962 subsequent to the decision below and while the case was pending before this court, on

petition for certiorari, Congress enacted Public Law 87-885, §4, 76 Stat. 1247, effective the same date. This enactment provides, in relevant part, for the amendment of §244 of the Act, the source of the Attorney General's power to suspend the deportation of eligible classes of aliens, by the addition of a new subsection, which states: 'No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman. . . .' Although petitioner concededly entered the United States as a crewman, and the Government has indicated that, when the merits of this are reached, it will argue that petitioner is now absolutely ineligible for the relief sought, because of the 1962 amendment to §244, we agree with the parties that the enactment of this amendment did not necessarily have the effect of rendering moot the jurisdictional issue involved in this litigation. The applicability of this provision to and in petitioner's situation is an arguable matter, and since it is not undisputed but remains debatable whether the relief sought by petitioner could still be granted, we have determined it not improper to consider and decide the threshold question of the jurisdiction of the Court of Appeals."

In addition to this Court's ruling on the question of mootness, it must also be pointed out that the Eighth Circuit in *Patsis*, at 337 F.2d 739, assumed for the purpose of its opinion that the amendment of Section 244 was inapplicable.

CONCLUSION

For the reasons stated, petitioner respectfully prays that this petition for rehearing be granted.

Respectfully submitted,

ALBERT J. YONKE,
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Counsel for Petitioner.